

## **A Commons Exchange: Aiding the Commons through Facilitating Website and Digital Art Adoption**

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**Abstract:** Much cultural commentary focuses on the problem that private or potentially embarrassing information on the Internet seems to live forever. But recently a new anxiety has developed, based on the fact that parts of the Internet simply die off. Ultimately all digital cultural creation that is not hosted by an established institution, and even much institutional material, will stagnate or be lost if possession of such work is not passed on to an enthusiastic new owner. Ventures like Internet Archive attempt to preserve the remains of the Internet gone by, but there is no entity that seeks to breathe new life into websites that would otherwise disappear, by helping to transition their ownership. A legal and technological mechanism is needed to maneuver around the intellectual property rights regime that hinders the free flow and evolution of artwork. This Paper proposes a new idea to bolster the Creative Commons and increase the dissemination of cultural creation: a commons exchange that facilitates contacts between those who are looking to hand off a project and those who are willing to take one up, so artists and website owners can protect and carry on the legacies of established works. In essence, the Internet needs an adoption agency for digital cultural creation.

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## I. INTRODUCTION

*A man Caesar is born, and for ages after, we have a Roman Empire. . . . An institution is the lengthened shadow of one man.*

—Ralph Waldo Emerson<sup>1</sup>

Contrary to Emerson's suggestive remark, few institutions actually last for ages. For instance, most democracies in the world are less than 100 years old. The majority of countries in much of Latin America, Asia, Africa, Eastern Europe, and parts of Western Europe—Spain under Franco, Portugal under Salazar, Germany under Hitler, Italy under Mussolini—have been liberated relatively recently from domestic or foreign (colonial) dictatorships. United Nations membership has grown from only 51 in 1945 to 193 today.<sup>2</sup> A third wave of democratization swept the globe two decades ago with the fall of communism,<sup>3</sup> yet “[t]here are at least 40 dictators around the world today.”<sup>4</sup> But both democracies and dictatorships are fragile.<sup>5</sup>

While igniting and passing on the torch of democracy has been immensely complex, successful transfers of less complicated endeavors have also been challenging. For example, family-run businesses often are sold, underperform, or do not survive if one generation does not have a passion or aptitude for the trade.<sup>6</sup> The

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<sup>1</sup> RALPH WALDO EMERSON, *THE ESSAYS OF RALPH WALDO EMERSON* 35 (Alfred Ferguson et al. eds., Belknap Press 1987) (1841).

<sup>2</sup> *Growth in United Nations Membership, 1945–Present*, UNITED NATIONS, [www.un.org/en/members/growth.shtml](http://www.un.org/en/members/growth.shtml) (last visited June 25, 2013).

<sup>3</sup> SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

<sup>4</sup> George B.N. Ayittey, *The Worst of the Worst: Bad Dude Dictators and General Coconut Heads*, *FOREIGN POL'Y* (July/Aug. 2010), available at [http://www.foreignpolicy.com/articles/2010/06/21/the\\_worst\\_of\\_the\\_worst](http://www.foreignpolicy.com/articles/2010/06/21/the_worst_of_the_worst). See generally GEORGE B.N. AYITTEY, *DEFEATING DICTATORS: FIGHTING TYRANNY IN AFRICA AND AROUND THE WORLD* (2011).

<sup>5</sup> Collier mentions that “[g]lobally since 1945 there have been some 357 successful military coups,” many of which have been against dictators. PAUL COLLIER, *WARS, GUNS, AND VOTES: DEMOCRACY IN DANGEROUS PLACES* 8 (2009).

<sup>6</sup> “We find that the maintenance of management within the family has a negative impact on the firm’s performance.” Marco Cucculelli & Giacinto Micucci, *Family Succession and Firm Performance: Evidence from Italian Family Firms*, 14 *J. CORP. FIN.* 17, 17 (2008). For an analysis of the factors leading to the success or failure of family firms, see generally

tradition of scholarship as a family enterprise—i.e., multiple generations producing scholarly works in the same field and even working on the same grand research projects<sup>7</sup>—was, even in its prime in Europe during the early modern period, fiendishly difficult to maintain.<sup>8</sup> Handing off any cultural, social, academic, or business enterprise to friends rather than family members is no easier. If we have trouble finding a friend to temporarily watch our dog or cat while we are away, we cannot rest assured that our friends will be the best qualified and most inclined to permanently adopt our website or digital artwork.<sup>9</sup>

The challenges of transition extend beyond the difficulty of finding a good fit. When attempting to continue a tradition of democracy, societies are routinely challenged by forces with personal or financial motives to weaken the rule of law, transparency, accountability, and the voice of the people. Similarly, the perpetuation of cultural creation—artwork and knowledge-based material created by diverse groups such as academia, nonprofits, and individuals—is also confronted by a focused yet powerful lobby of entertainment and content producers, Big Copyright, set against expanding the Commons, and reducing competitive pressures in the production of artwork. In societies and other institutions, longevity is often achieved through social and cultural rigidity, as was the case for many ruling dynasties and cultural institutions through time.<sup>10</sup> This Paper seeks to find a compromise for the Internet that would achieve both longevity and flexibility.

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DAVID S. LANDES, *DYNASTIES: FORTUNES AND MISFORTUNES OF THE WORLD'S GREAT FAMILY BUSINESSES* (2006).

<sup>7</sup> See generally Caroline R. Sherman, *The Genealogy of Knowledge: The Godefroy Family, Erudition, and Legal-Historical Service to the State* (Jan. 22, 2008) (unpublished Ph.D. thesis, Princeton University) (on file with Mudd Library, Princeton University).

<sup>8</sup> *Id.*

<sup>9</sup> Also, studies have shown that community ties are fraying—i.e., that civil society is weakening on numerous levels, from individual families to the nation-state. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

<sup>10</sup> See generally Charles de Montesquieu, *The Spirit of the Laws* (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748) and Roland Mousnier, *Les Institutions de la France sous la Monarchie Absolue: 1598–1789* (1974–1980).

*A. Restrictions on the Commons*

In this age of ever-expanding copyright protections, there is a widespread countermovement to aid the Commons that nurtures and protects art, knowledge, and expression that are given freely to all.<sup>11</sup> The free culture tradition “is as important as any tradition of freedom in our history. . . . Not the tradition that celebrated the power to steal Britney Spears’ music, but the ability of people to build on the past without apology.”<sup>12</sup> The free software movement<sup>13</sup> and Creative Commons “see the expansion of copyright as a threat to the stated goal of copyright law itself: the promotion of science and useful arts.”<sup>14</sup> Lessig perceives the astounding expansion of copyright as an example of “law captured in a way that undermines some of its most important values and tradition: a tradition that has supported innovation and creativity, has supported the new against the old, but is now increasingly captured by the old to protect itself against the new.”<sup>15</sup> He views the current copyright over-restrictiveness as “dinosaurs controlling evolution.”<sup>16</sup>

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<sup>11</sup> “Rousseau said that the first person who wanted a piece of nature as his or her own exclusive possession and transformed it into private property was the person who invented evil.” David Berry, *The Commons*, FREE SOFTWARE MAG. (Feb. 21, 2005), available at [http://www.freesoftwaremagazine.com/articles/commons\\_as\\_ideas](http://www.freesoftwaremagazine.com/articles/commons_as_ideas). While I take an expansive yet flexible view of the Commons in this Paper, for example, by including works technically deemed to be in the semicommons, my view is not as expansive as Rousseau’s. Further, even if a website is not under a Creative Commons license, individuals can still potentially benefit from the cultural creation. Additionally, I assume any increase in the Commons is a positive development because it provides more cultural creation for people to discover and to learn and create from.

<sup>12</sup> Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763, 777 (2003).

<sup>13</sup> The free software movement is distinct from open source software. While the free software movement will be discussed further below, for a discussion of open source software, see generally ERIC RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* (2001).

<sup>14</sup> Shun-ling Chen, *To Surpass or to Conform—What Are Public Licenses For?*, U. ILL. J.L. TECH. & POL’Y 107, 107 (2009); *Feist Publ’ns, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 349 (1991) (averring that the main objective of copyright is not to compensate authors for their effort).

<sup>15</sup> Lessig, *supra* note 12, at 763.

<sup>16</sup> *Id.* at 775.

Dusollier states that “[t]he copyright industry has developed many tools to exercise the prohibitive part of copyright.”<sup>17</sup> For example, she mentions that “[l]icense contracts are mostly drafted to arrange the authorization of a restricted use in return for remuneration.”<sup>18</sup> Furthermore, “[s]ome rights are administered by collecting societies so that the authors are in a stronger position to enforce the prohibition on use or to negotiate the financial conditions for some use; technology is now intervening to enforce the rights that have been defined by the copyright owners and paid for by the user.”<sup>19</sup> Those concerned with the Commons need to further develop new tools to exercise the open aspect of our culture.

The open cultural creation movement can be restricted by at least three avenues. First, material that is privately owned may never reach the Commons. Second, information in the public domain may be lost—because the creator no longer has the time or does not keep up with code updates or due to external reasons like software no longer being supported, such as Microsoft’s discontinuation of the content management system FrontPage.<sup>20</sup> Third, the Commons’ development can be limited by insufficient legal, technological, or institutional support mechanisms.

Existing nonprofit organizations have greatly aided the Commons by addressing aspects of all three constraints. Creative Commons pushes back against the first restriction by providing more options to creators for sharing their work. The Internet Archive tackles the second restraint: it prevents the loss of information by saving pages to document the historical progression of the Internet over time.<sup>21</sup> Wikipedia confronts the third constraint by providing an obvious outlet for the creation of free, easily accessible knowledge.

Yet the Commons needs other novel legal and technological tools to further support it. Creative Commons cannot envelop all

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<sup>17</sup> Séverine Dusollier, *The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 280 (2006).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> ComputerGeekMatt, *Microsoft FrontPage Discontinued in Late 2006*, DIGITAL J. (Dec. 8, 2006) available at <http://digitaljournal.com/article/70028>.

<sup>21</sup> The Internet Archive is an underappreciated gem protecting the web—it fulfills its mission of archiving the Internet superbly. However, helping material live on is not part of its mission.

possibilities for enhancing sharing. The Internet Archive likewise cannot practically save all data,<sup>22</sup> nor can it support the continued growth and development of the dead websites it memorializes. Wikipedia cannot cover all information, nor again does the Commons want one source of information, regardless of how benevolent it might be. These are not criticisms but rather acknowledgements that no idea or institution, regardless of how helpful or transformative, can solve all problems. The Commons needs additional complementary institutions to strengthen its vitality.

What happens when someone running a website wants to move on to another project or retire? What happens when she dies? All too often, the website, no matter how useful, either goes dark or stagnates. And yet, there is always fresh talent willing to make a mark on the Internet. Every possible area of human interest has aficionados who would gladly work for free on relevant websites. But there is no way to match up those who want to pass on the torch for a cultural creation with those who would like to pick it up. The Internet has no adoption agency.

Websites that are not handed over to a new generation usually suffer their fate because of a lack of contacts, even in this interconnected age. Moreover, taking over another person's site requires navigation of uncertain legal waters that a non-lawyer might hesitate to grapple with. A parallel problem exists for digital artwork. It can be difficult for artists to find an executor they are comfortable with. Creative Commons licenses do not practically resolve the issue of owners transferring all their rights to others when they can no longer maintain them.

Bhagwati states: "Cultures will certainly change over time, as invention, organizational innovation, political change such as

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<sup>22</sup> The ideal solution to get all the information from a webpage is to go to the source—the person who owns the rights to the information on the website and has access to it—not to a third party like Google or the Internet Archive. This is because the Internet Archive is at times blocked by Robots.txt from collecting information from a website. Plus, it cannot get to password-protected information, etc.

One can get information from Google cache but should only look to do so in a dire emergency. It is a terrible, incomplete solution because Google does not primarily save all websites. Its strategy is to be a database of relational information on websites—a database of relationships between search words and pages. Each webpage gets an identifier, then Google finds all the words on a page. Next, it creates a concordance—for example, a list of all the websites that it indexes with the word "MLB" and another list of all websites with the word "pitchers." If someone does a search for "MLB pitchers," Google first calls up the list of all websites with the word "MLB," then calls up the list that contains all the websites with the word "pitcher." Finally, it determines which websites have both words.

democratization, and globalization on many dimensions occur.”<sup>23</sup> He believes that “[t]his process of decay of the old and evolution of the new always evokes nostalgia among more sensitive observers.”<sup>24</sup> Thus, “[a]s cultures evolve and elements of them vanish, we must decide what we need to remember and retain in our midst. All of the past cannot be frozen endlessly in time.”<sup>25</sup> While some websites and artwork might deserve to fade away quietly, countless others are not only worth preserving but also capable of evolving.

### B. *The Proposal*

This Paper proposes a new legal idea to bolster the Commons and increase the dissemination of cultural creation: a commons exchange that facilitates contacts between those who are looking to hand off a project and those who are willing to take one on. A commons exchange would connect individuals who have existing cultural creations but can no longer maintain them to individuals who would like to adopt established works. For example, if someone maintains a website on a particular galaxy but no longer has the time to run it, she could post information about her site on a commons exchange and ask others to take it over for free.

A commons exchange would also provide this same free adoption or matching service for artists looking to hand over digital artwork. Even artists who have material under a Creative Commons (CC) license still need to set in place plans to transfer ownership of their artwork in the future (except perhaps CCo where no rights are reserved, and CC BY where only attribution rights are reserved).<sup>26</sup> A commons exchange would facilitate such transition planning through free legal and technological assistance. It would clarify the legal steps necessary—from the transfer of artwork to URLs—to aid such transitions, just as Creative Commons has done for sharing.

In Sartre’s note read in Stockholm explaining why he was declining the Nobel Prize for literature, he stated: “A writer must

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<sup>23</sup> JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 112 (2004).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 113.

<sup>26</sup> Furthermore, it is debatable whether the CC BY license can accomplish the task of successfully passing on the work to future generations. See *infra* Section II.

refuse . . . to allow himself to be transformed into an institution.”<sup>27</sup> A commons exchange would not institutionalize cultural creation in the sense of having it become an instrument of propaganda or profit for the powerful—the very thing that Big Copyright does with the material it owns. The purpose behind a commons exchange is not to help large, well-known institutions—i.e., the Googles and Facebooks of the world. Furthermore, owners of sites visited by millions of individuals a day do not fear being unable to find an appropriate suitor to carry on their legacy. Often this is because the most popular sites are run by established institutions, which have substantial internal history, support mechanisms, and stable finances. Rather, a commons exchange is meant to thicken the supportive netting underneath cultural creations that have limited audiences but that make up a vast portion of the web. While it is estimated that there are roughly 189 million websites globally,<sup>28</sup> the top million are “responsible for the great majority of web traffic.”<sup>29</sup> A commons exchange is meant to help many of the creators of the remaining 188 million websites—99.5% of all websites—when they can no longer support their site or determine that it is time to take a new direction artistically. Just as in the collaborative development of software “given enough eyeballs, all bugs are shallow,” so through a commons exchange that brings together enough suitors, all cultural creation can find a new home.<sup>30</sup> Unless we find a more stable way to transition the ownership of cultural creation, the demand for a commons exchange will remain robust. While most cultural creation will not need to be adopted at any given moment, over time all cultural creation not owned by institutions and a good amount of material from institutions will need to find new suitors.<sup>31</sup>

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<sup>27</sup> Jean-Paul Sartre, Declaration Read in Stockholm, Sweden (Oct. 22, 1964).

<sup>28</sup> *July 2013 Web Server Survey*, NETCRAFT, [news.netcraft.com/archives/category/web-server-survey](http://news.netcraft.com/archives/category/web-server-survey) (last visited July 30, 2013).

<sup>29</sup> *Hosting Locations of the Million Busiest Websites*, NETCRAFT, [www.netcraft.com/internet-data-mining/million-busiest-websites](http://www.netcraft.com/internet-data-mining/million-busiest-websites) (last visited July 30, 2013).

<sup>30</sup> RAYMOND, *supra* note 13, at 30.

<sup>31</sup> The problem a commons exchange aims to solve is partially related to the problem of temporal interoperability—ensuring that existing cultural creations can be opened and understood in the future, given, for example, the rapid changes in code. *See generally* Robert E. Kahn, *Perspectives on Interoperability of Systems* (May 23, 2011) (presentation at Institute of Medicine Roundtable on Value & Science-Driven Health Care) (Kahn is a co-inventor of the TCP/IP protocols).



Tim Wu maintains that the “production of expressive works can be broken down into three standard stages”—creation, dissemination, and improvement.<sup>32</sup> In his analysis, “[a]t each stage, production can be fully open, fully closed, or somewhere in between.”<sup>33</sup> Depending on the nature of the cultural creation, a commons exchange would aim to support it in one or more of these stages. For example, certain websites providing information on new economic events, novel theories of philosophy or literature, or efforts to catalogue new archeological or evolutionary findings can be supported by a commons exchange at all three stages. On the other hand, if a commons exchange helps facilitate the adoption of digital photographs, its assistance would primarily be through having maintained public access to the work. Yet someone adopting the digital photo could always display the original online next to a revised version that has been updated by the new steward.

A commons exchange would allow anyone to post a cultural creation for adoption and give anyone the ability to search the entire database of available material. It would allow the owner of the artwork to summarize the creation and tailor the application requirements for those interested in adopting the work. Once an adoption is agreed to, a commons exchange would provide the parties with a free legal document that would enable the assignment or transfer of the copyrighted material.<sup>34</sup> Following in the path-breaking steps of Creative Commons, a commons exchange could slightly modify Creative Commons’ famous three-layer design of licenses to create three levels of assignments—the legal, human-readable, and machine-readable layers.<sup>35</sup> A commons exchange could also provide a manual on how to update code, create a forum for individuals to discuss related issues, and possibly even foster a group of volunteers to assist website owners in updating their sites. Numerous other ideas could be incorporated into a commons exchange, such as advocating for vendor

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<sup>32</sup> Tim Wu, *On Copyright’s Authorship Policy*, U. CHI. LEGAL F. 335, 343 (2008).

<sup>33</sup> *Id.*

<sup>34</sup> Such copyright assignment contracts could be available for different countries and legal systems.

<sup>35</sup> The machine-readable layer could consist of websites up for adoption posting a commons exchange “adopt me” logo on their websites that could be identified by search engines. This would create a second way for individuals to discover what works are up for adoption, in addition to browsing the commons exchange website listings.

relationship management (VRM) software,<sup>36</sup> formulating prelaunch publicity,<sup>37</sup> requiring foundation grantees to use a commons exchange,<sup>38</sup> presetting automatic adoption code,<sup>39</sup> etc. Finally, in certain jurisdictions such as the European Union, legal issues including database regulations,<sup>40</sup> privacy laws,<sup>41</sup> and moral rights issues<sup>42</sup> would need to be addressed.

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<sup>36</sup> The goal of VRM software is to “cause development of tools that would make individuals both independent of vendors and better able to engage with them.” DOC SEARLS, *THE INTENTION ECONOMY: WHEN CUSTOMERS TAKE CHARGE* xii (2012) (Searls coined the term “VRM” and founded ProjectVRM). For example, VRM software could allow a website administrator to deal with her DNS provider, ISP, email provider, etc., all through one portal. She could select all of the above vendors at the same time and reassign them to someone else in one step. Without VRM software, attempting to adopt email addresses, Twitter handles, and Facebook profiles would be beyond an initial formulation of a commons exchange.

<sup>37</sup> To rally interest and support before the launch, a commons exchange could create publicity by asking a few famous artists to agree to each put up a work for adoption.

<sup>38</sup> As a funding condition, foundations could require grantees to put their sites up for adoption if they ever abandon them.

<sup>39</sup> A commons exchange could theoretically provide ready-to-use code for individuals to insert into their websites that would automatically put the site up for adoption if a particular condition is met, such as the site not being updated for two years or the site getting fewer than, for example, 1,000 hits in a year.

Even if such code did not come about, a commons exchange would still be a convenient way for those who inherit digital artwork or a website, but do not have a passion for the material or subject matter, to respect the spirit of the deceased artist by passing it on to someone with a more realistic chance of maintaining it.

<sup>40</sup> See J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997).

<sup>41</sup> See Michael D. Birnhack, *The EU Data Protection Directive: An Engine of a Global Regime*, 24 COMPUTER L. & SECURITY REP. 508 (2008). For the debate on the updating of EU privacy rules, see James Kanter & Somini Sengupta, *Europe Continues Wrestling with Online Privacy Rules*, N.Y. TIMES, June 7, 2013, at B1.

<sup>42</sup> See Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AMER. J. COMP. L. 67 (2007).

*C. The Benefits of a Commons Exchange*

It is easiest to see the loss of cultural creation by recalling high-profile losses.<sup>43</sup> For example, the number of different websites and services sponsored by technology giants that died in only one year, 2009, strongly suggests that countless smaller websites routinely die off. In the course of that year, Google killed Dodgeball and Notebook;<sup>44</sup> Yahoo let Briefcase die off;<sup>45</sup> Microsoft called it quits with Encarta;<sup>46</sup> Hewlett-Packard ended Upline;<sup>47</sup> and Wikia pulled the plug on Wikia Search.<sup>48</sup> The fact that even technology giants are getting rid of websites shows how much more difficult survival must be for websites without institutional support. The lack of institutional support and the overly restrictive copyright regime have led to a staggering number of works that are either orphans—works under copyright where the owner is either unknown or unreachable—or in danger of becoming orphans. For example, 90% of photos held by

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<sup>43</sup> Another angle from which to view the demise of cultural creation is to simply look at one popular area of creation, such as videos, to get a sense of the overall number that exist and then assume at any given time a portion are already copyright orphans or are soon to become so. For example, while Google does not appear to release the number of videos that have been uploaded to YouTube, “[i]n 2011, YouTube had more than 1 trillion views or around 140 views for every person on Earth.” YouTube, Statistics, [https://www.youtube.com/t/press\\_statistics](https://www.youtube.com/t/press_statistics) (last visited July 30, 2013). Also, “72 hours of video are uploaded to YouTube every minute.” *Id.* Assuming each video is on average five minutes long (videos cannot be longer than 15 minutes), this equates to over 450 million videos being uploaded onto YouTube each year.

A further perspective is to attempt to estimate the number of website orphans and/or material soon to become abandoned. Any such result would be an estimate with a high error margin for there are no easy ways to do this. For example, one could attempt to run Google searches for a few dozen common words and note the number of hits. Then one could run the same search but limit it to results updated in the last year, an advanced Google option. Subtracting the two does provide an estimate, but it is unreliable because Google is a database of relationships between different search words and webpages. For example, no separate webpage might exist but Google may treat certain information as a page nonetheless, such as a request on a website that is computational.

<sup>44</sup> Josh Lowensohn, *15 Sites that Died in 2009*, CNET (Dec. 23, 2009), available at [http://news.cnet.com/2300-27076\\_3-10002066-1.html](http://news.cnet.com/2300-27076_3-10002066-1.html).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

museums in the United Kingdom are orphan works.<sup>49</sup> This equates to seventeen million works in just one artistic medium<sup>50</sup> in a country with five times fewer individuals than the United States. While other artistic mediums have a smaller percentage of orphan works, the figures still add up to millions of neglected, unusable works—e.g., a “conservative estimate” is that copyright orphan books comprise 13% of “the total number of in-copyright books” in Europe.<sup>51</sup>

Some family members might adopt a relative’s website or a friend might step in, but such serendipity is not a strategy. Further, no formal institutional structure exists to facilitate digital adoption.<sup>52</sup> An institutional adoption mechanism for cultural creation, a commons exchange, would substantially lower the current high transaction costs of passing on one’s work to another, and also of creation in general. Lowering such costs, which primarily take three forms—temporal, financial, and legal—would bring numerous substantial benefits.<sup>53</sup>

First, a dedicated institution would significantly prevent the orphaned works problem in the future by providing a method of

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<sup>49</sup> Anna Vuopala, *Assessment of the Orphan Works Issue and Costs of Rights Clearance* 5 (May 2010), [ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reports\\_orphan/anna\\_report.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf) (report prepared for the European Commission, DG Information Society and Media, Unit E4 Access to Information).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> This is because people do not usually use the Internet Archive for general searches but rather to find an old cache of a specific website (assuming some sites are no longer on the Internet) or for research purposes. If a site goes offline, very few individuals would think of searching for something they are interested in by going to the Internet Archive. Also, the Internet Archive does not archive everything—e.g., robots.txt on a site prevents the Internet Archive from saving a copy and the Internet Archive cannot access password-protected sites. Further, the Internet Archive does not assist sites to live on dynamically. It provides only a snapshot in time.

<sup>53</sup> Another potential benefit is that there are few ways for foreigners to assist the poor in developing countries, especially within a cultural context. Skladany proposes a new method: weakening the copyright regime in developing countries so that citizens have greater access to developed country artwork. This greater access will hopefully over the long term provide an opportunity for developing country citizens to further appreciate the messages of human rights, equality, and freedom that implicitly or explicitly permeate much artwork from developed countries. See Martin Skladany, *The Revolutionary Influence of Low Enlightenment: Weakening Copyright in Developing Countries to Improve Respect for Human Rights and the Rule of Law*, 95 J. PAT. & TRADEMARK OFF. SOC’Y (forthcoming 2013).

publicizing that a work is up for adoption, by creating a process for easily soliciting interest and selecting the right person to take over, and by offering free legal tools to formally complete the adoption. Creators have put sweat and blood into what they have brought to life and do not want to see their creations disappear. Regardless of whether such individuals put their digital content up for adoption, because they no longer have the time or money to continue creating, cannot fix technical problems, or simply want to move on to new projects, a commons exchange would prevent their creations from being discarded. Part of the value of preserving artwork is that no one knows when great art will be recognized as such—e.g., Van Gogh sold only one painting during his lifetime.<sup>54</sup> Furthermore, preservation matters because the disappearance of artwork or excessive restriction of its availability not only is needless but discourages creation. Drahos and Braithwaite recognize that a restricted commons reduces creativity and dampens innovation.<sup>55</sup>

By reducing the amount of lost material and the number of copyright orphans, a commons exchange would lessen the harmful effects of our overly restrictive copyright regime. A commons exchange would also mitigate copyright's harmful effects in that it would provide free legal forms to resolve the uncertainty behind taking over another's work. Even if one is simply passing on work to a friend, there is legal uncertainty in the transfer that makes some people feel uncomfortable or reluctant to spend the time and money to have a lawyer draft a copyright assignment. For example, friends not steeped in copyright law might not realize that in order to reduce possible confusion in the future, they could be explicit about what a website adoption would entail—i.e., the transfer of all or only part of a website's many copyrighted components including text, images, video, stylesheets, and code.<sup>56</sup> A commons exchange would facilitate the transfer for free and without hassle.

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<sup>54</sup> VALERIE BODDEN, VAN GOGH 39 (2008).

<sup>55</sup> PETER DRAHOS WITH JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 2 (2002).

<sup>56</sup> Such considerations need to also be made for licensing. See *Before Licensing – CC Wiki*, CREATIVE COMMONS, [http://wiki.creativecommons.org/Before\\_Licensing](http://wiki.creativecommons.org/Before_Licensing) (last visited May 31, 2013).

Second, having more cultural creations under open licenses<sup>57</sup> and available for much longer periods instead of disappearing is beneficial in and of itself, yet a commons exchange would go beyond the simple static retention of artwork because it would enable newly adopted works to evolve dynamically under the direction of the new owners. Of course some adopted pieces will not be dramatically reworked, but this is not a limitation. Depending on the form and content of the cultural creation and the vision of the new creator, adopted works will evolve to different degrees.

Information, knowledge, and artwork need to live and breathe, not stagnate in the attic. A map of the world from 2010 is already outdated on the country level, let alone on the state or local level.<sup>58</sup> A 2011 history of the Nazi persecution during World War II is incomplete because it excludes the recently released first comprehensive study on the total number of concentration camps, forced labor camps, prisoner-of-war camps, brothels, ghettos, and other detention centers.<sup>59</sup> A 2012 listing of the rosters of each baseball team is far from current.<sup>60</sup> We have a new understanding of the link between eating red meat and heart disease—“a little-studied chemical that is burped out by bacteria in the intestines after people eat red meat.”<sup>61</sup>

As discussed earlier, such dynamism often makes cultural creation more valuable to us because it provides up-to-date information or because it allows for a dialogue. Chen reminds us that “[a]ll works, embodiments of ideas, and expressions are intermediaries that channel the ideas of one to others.”<sup>62</sup> Yet “no one will be able to know

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<sup>57</sup> My use of the term “open licenses” does not mean open source licenses, rather simply licenses that are far away from the restrictive nature of copyright—licenses that allow others a wide range of free uses.

<sup>58</sup> *Member States of the United Nations*, UNITED NATIONS, available at <http://www.un.org/en/members> (last visited June 8, 2013) (listing the date of admission of each country into the United Nations).

<sup>59</sup> Eric Lichtblau, *The Holocaust Just Got More Shocking*, N.Y. TIMES, Mar. 3, 2013, at SR3.

<sup>60</sup> See generally Baseball Almanac, Year-by-Year Baseball History, available at <http://www.baseball-almanac.com/yearmenu.shtml> (last visited June 8, 2013) (links to team rosters for each year).

<sup>61</sup> Gina Kolata, *Culprit in Heart Disease Goes Beyond Meat's Fat*, N.Y. TIMES, Apr. 7, 2013, at A14.

<sup>62</sup> Chen, *supra* note 14, at 137.

how well one is understood until one actually hears other people's responses" in the form of comments, borrowing portions of the artistic expression under the fair use doctrine, or creating derivative works.<sup>63</sup> Such "ability to communicate between members is key for any community to remain vital."<sup>64</sup> Foucault argues that through their work creators begin a "discursive practice."<sup>65</sup> Their work "gives other creators the opportunity to pursue the creative process."<sup>66</sup>

Third, the existence of a commons exchange would not only help ensure the dissemination and improvement of existing artwork but also motivate more individuals to create and innovate. This would occur for numerous reasons. A more robust Commons would provide creators with more material—the previously unavailable work—to use as building blocks for their artwork. More individuals would be inspired to create because they would have more assurance that their creations would have the time and means to evolve and find an audience. More individuals looking to test the creative waters would be encouraged by the possibility of adopting another's site, which could be less daunting than striking out on their own. Furthermore, both individual and collaborative production would be fostered by a growing sense of community where members help each other through adopting established works.<sup>67</sup> For example, a group of peers could decide to adopt and update a website together. Or one individual who adopts a website could encourage others to add content or comment about the newly adopted site. Conversely, a group could adopt a website and incorporate its content into their existing site. Alternatively, groups of individuals interested in certain topics could band together and adopt numerous sites on related topics, with the aim of creating something greater than the sum of its parts. Such

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 138.

<sup>65</sup> Dusollier, *supra* note 17, at 286 (citing Michel Foucault, *What Is an Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 141, 154 (Josué Harari ed., 1979)).

<sup>66</sup> *Id.*

<sup>67</sup> Carroll discusses the example of the project Connexions at Rice University at length. He believes this example shows how "Creative Commons facilitates not only dissemination, but also collaboration and community-building." Michael W. Carroll, *Creative Commons and the New Intermediaries*, 2006 MICH. ST. L. REV. 45, 58 (2006).

efforts would not only create better sites, but also encourage deeper commitment to collaborative, peer-based production.<sup>68</sup>

Cultural creation is important for both those who experience and interact with it and those who make it. A created work enriches society by providing information, insight, and beauty to its audience. The act of creation is critical to the individual wellbeing of all of us.<sup>69</sup> As Arthur Miller stated, “If somebody doesn’t create something, however small it may be, he gets sick.”<sup>70</sup> Creating enables individuals to communicate through different channels, to achieve a greater sense of autonomy, and to experience the freedom of mastering an art form or area of knowledge through extended practice. Creating something, however modest, in the words of Unger, helps prevent our personalities from hardening or ossifying.<sup>71</sup> We need to strive for “work that both expresses us and changes us and does both by mastering and transforming some aspect of the structure of arrangements and beliefs within which we move. By changing the world, we relieve it of some of its dumb facticity and its burdensome alienness; we set our imprint upon it.”<sup>72</sup>

The process of creation, especially in the cooperative context, can also lead us to cultivate virtue. In the Aristotelian spirit of virtue theory,<sup>73</sup> Benkler and Nissenbaum have argued that expanding the Commons increases the number of opportunities for people to act in

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<sup>68</sup> A work could possibly be legally assigned to numerous unrelated individuals—multiple simultaneous adoptions—as opposed to a group of friends or colleagues or an online community collectively taking over a work. This would also be in contrast to providing nonexclusive licenses to unconnected individuals à la Creative Commons.

<sup>69</sup> Martin Skladany, *Alienation by Copyright: Abolishing Copyright to Spur Individual Creativity*, 55 J. COPYRIGHT SOC’Y U.S.A. 361, 362 (2008).

<sup>70</sup> Arthur Miller, *What I’ve Learned*, ESQUIRE, July 2003, at 110 (interviewed by John H. Richardson).

<sup>71</sup> Roberto Mangabeira Unger, THE BETTER FUTURES OF ARCHITECTURE 7 (May 10, 1991), available at <http://www.law.harvard.edu/faculty/unger/english/pdfs/architecture1.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> Aristotle developed a theory of ethics called virtue theory, which is one of the main normative theories along with deontology and consequentialism. These three moral theories center on virtue, rights, and consequences, respectively. While there are different strands of virtue theory, the central principle is that one becomes good by doing good deeds. By acting in a virtuous manner, over time one internalizes virtue. Bernard Williams, *Ethics*, in PHILOSOPHY 1: A GUIDE THROUGH THE SUBJECT 551 (A.C. Grayling ed., 1998).



ways that cultivate or encourage virtue.<sup>74</sup> These opportunities to promote virtue materialize when the creative environment is enhanced, which occurs when more material is free to use as inputs into creation by individuals and groups working on collaborative, Commons-based projects.<sup>75</sup>

Fourth, a commons exchange would help check the power of Big Copyright, the powerful creative corporations that rely on copyright for their survival. Wu, with Dusollier in agreement,<sup>76</sup> argues that authorial copyright, as opposed to a copyright system that vests rights in commercial intermediaries, may “act as a check on the market power of dominant distributors.”<sup>77</sup> Wu maintains “[t]his is possible because authors have the potential to use their independent ownership of new or reverted copyrights as the property right that anchors new modes of production.”<sup>78</sup> Wu believes this to be the case because, “when it comes to authorial innovation—new means of creating works, or new ideas of what a work is—authorial control of copyright gives the author the initial space to create the work and get rights without considering distribution.”<sup>79</sup> In his view, “[t]his separation, on the margin at least, should lead to the invention of creative works that are different than those that would be created were copyright something that vested in the distributor.”<sup>80</sup> Wu says, “[w]e see this in the models of mass authorship (like wikis), open source software, and creative commons, which are aided by the existence of an authorial right that exists whether or not there is a distribution stage for the works in question.”<sup>81</sup>

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<sup>74</sup> Yochai Benkler & Helen Nissenbaum, *Commons-Based Peer Production and Virtue*, 14 J. POL. PHIL. 394, 394 (2006).

<sup>75</sup> *Id.*

<sup>76</sup> Dusollier, *supra* note 17, at 285–86. “In the Creative Commons scheme, the author has a central position: she retains her rights and decides what will be done with her work, with no intermediary to dictate a certain type of exploitation.” *Id.*

<sup>77</sup> Wu, *supra* note 32, at 341.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 342.

<sup>81</sup> *Id.*

Wu contends that the “principal means for achieving” a neutral copyright system is “to maximize the decentralization of copyright ownership and enforcement.”<sup>82</sup> He avers: “When as many entities as possible control the ownership or enforcement of copyright, they may experiment with many different modes of production, from which the fittest will survive.”<sup>83</sup> In the same way that the best method for checking the power of commercial copyright entities is to maximize the decentralization of copyright ownership,<sup>84</sup> by preventing the loss of existing cultural creation and supporting the creation of new material, a commons exchange would also act as a counterweight to the abuse of power by Big Copyright.

A commons exchange would provide decentralization and an incentive to create, both of which would in the long term lead to, among other benefits, the enhancement of the public’s political voice. The political value of encouraging independent websites and artwork to continue to exist as a counteractive force against Big Copyright and proprietary systems like Facebook occurs on numerous levels. In the long term, such decentralization would enable a wider group of individuals to create and define their society’s political and cultural vocabulary and values, which would help individuals be heard and contribute more to determining the political agenda.<sup>85</sup>

Section I of this Paper will discuss how copyright, though not the sole culprit, is one of the most prominent factors in creating tens of millions of copyright orphans and lost work. Section II will note the attractiveness of collaborative, peer-based production projects most closely associated with the free software movement yet acknowledge that this mode of keeping work alive through continuous modular creation is unlikely to be adopted by the vast majority of cultural creators. Section III will discuss how the philosophical vision of the free software movement is more attractive than the vision exposed by Creative Commons and hence should be adopted by a commons exchange. Yet, given the structure and wide adoption of Creative

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<sup>82</sup> *Id.* at 349.

<sup>83</sup> *Id.* at 349–50.

<sup>84</sup> Such authorial copyright does not suggest a preference for overreaching copyright or discouraging sharing and borrowing existing works in the process of creation.

<sup>85</sup> Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991), and Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215 (1996).

Commons licenses, a commons exchange should ask, but not mandate, everyone putting cultural creations up for adoption to consider putting the material under an open Creative Commons license. Section IV will discuss some of the most prominent potential criticisms of a commons exchange and demonstrate how they are either false or capable of being managed. Finally, Section V will briefly conclude.

## II. COPYRIGHT'S HARM

If copyright did not exist, an incredible portion of artistic expression would be in the Commons—essentially any artwork made accessible to others instead of being locked up in a cabin or cabinet. Assuming such an incredibly rich public domain came to be, there would still be a significant need for a commons exchange, yet the challenge to maintain a vibrant public domain would be less daunting. Copyright did not create the problem of lost or stagnant cultural creation, yet it has significantly exacerbated the problem. Even without copyright, knowledge and art would be lost en masse, not updated, or rendered useless by being contained within obsolete code.

Unfortunately for the vitality of the Commons, copyright exists. Further, it does not provide any guidance or assistance in solving the continual problem of lost information and art for the vast majority of cultural creations that are not commercially successful.<sup>86</sup> In fact, copyright substantially compounds the problem because of its very nature—it is a legal restriction preventing free access to and modification of artwork. Even if such restriction were moderate, as when the first copyright law in the United States was introduced in 1790—providing protection only to maps, charts, and books upon deposit, registration, and notice for 14 years with the possibility of a 14-year extension if the author was still alive—the very existence of copyright would inevitably create copyright orphans.<sup>87</sup> A commons exchange would attempt to prevent the creation of more website and artwork orphans by getting such cultural creations adopted before they are left behind.

Yet copyright's length, scope, and reach are no longer moderate; copyright has ramped up significantly and now imposes severe limits on access to new works—copyright orphan or not. The ballooning of

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<sup>86</sup> This assumes that corporations, heirs, or others close to the original creator will value the commercially successful artwork because of its financial value.

<sup>87</sup> Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790).

copyright is best captured by Lessig's quip that "[copyright] was a tiny little bit of regulation of the creative process; it has since expanded dramatically."<sup>88</sup> The "law governing creativity has changed, transformed dramatically in the past forty years in a way that removes the opportunity for the kind of creativity that was our tradition just at the time when the technology would turn it into something extraordinary."<sup>89</sup>

The length of copyright protection has swelled radically, initially from 14 years in 1790, with the possibility of another 14 if the author was still alive at the end of the first term,<sup>90</sup> to 28 years with the same 14-year extension,<sup>91</sup> to 28 years with a 28-year extension.<sup>92</sup> Subsequently, "beginning in 1962, the copyright term has been increased for works that already exist quite regularly. Eleven times in the last forty years Congress has extended the copyright term for existing works."<sup>93</sup> The most recent extension added 20 years of protection to existing works to stretch the length of copyright, for individuals, to the life of the author plus 70 years after her death<sup>94</sup> and, for corporations or within a work for hire context, to the earlier of 95 years from publication and 120 years from creation.<sup>95</sup>

The scope of copyright has also dramatically increased to encompass musical works,<sup>96</sup> photographs,<sup>97</sup> paintings,<sup>98</sup> software,<sup>99</sup>

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<sup>88</sup> Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1, 4 (2004).

<sup>89</sup> *Id.*

<sup>90</sup> Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790).

<sup>91</sup> Copyright Act of Feb. 3, 1831, ch. 16, §§ 1–2, 4 Stat. 436 (1831).

<sup>92</sup> Copyright Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (1909).

<sup>93</sup> Lessig, *supra* note 88, at 5.

<sup>94</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>95</sup> 17 U.S.C. § 302 (1998).

<sup>96</sup> Copyright Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (1831).

<sup>97</sup> Copyright Act of Mar. 3, 1865, § 2, 13 Stat. 540 (1865).

<sup>98</sup> Copyright Act of July 8, 1870, § 86, 16 Stat. 198, 212 (1870).

<sup>99</sup> Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (1980).

architecture,<sup>100</sup> and “anything basically reduced to a tangible form” including grocery lists.<sup>101</sup> Previously, in order to obtain copyright protection, a work had to be registered, copies deposited, and proper notice affixed to the work—regulations that have all been erased from the law.<sup>102</sup> Furthermore, initially copyright regulated only the publication and distribution of unauthorized exact copies, but now it prohibits unauthorized derivative works<sup>103</sup> and applies to commercial and noncommercial copies and public performances and displays.<sup>104</sup> Additionally, early copyright regulated the use of artwork by the content industry, not by individuals.<sup>105</sup>

Numerous copyright doctrines are meant to carve out exceptions or different permitted uses of copyrighted material. For example, the fair use doctrine allows individuals to utilize a portion of a copyrighted work legally.<sup>106</sup> Whether a use is permitted is based on four factors within the Copyright Act, yet the Supreme Court has averred that all such determinations must be made not using bright-line rules but instead on a case-by-case basis.<sup>107</sup> Also, the idea/expression dichotomy holds that ideas cannot be copyrighted, only particular expressions of ideas can be.<sup>108</sup> Unfortunately, the Supreme Court’s refusal to set any bright-line rules has significantly reduced individuals’ willingness to rely on fair use or to a lesser extent on the idea/expression dichotomy. This has substantially reduced the amount of material on which artists can draw.

Finally, through the combination of anti-circumvention laws and increasing technology, the reach of copyright has substantially

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<sup>100</sup> Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, § 703, 104 Stat. 5089, 5133 (1990).

<sup>101</sup> Lessig, *supra* note 88, at 5.

<sup>102</sup> *See, e.g.*, Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2853.

<sup>103</sup> Copyright Act of July 8, 1870, § 86.

<sup>104</sup> Copyright Act of Mar. 4, 1909, § 320(d), 35 Stat. at 1075.

<sup>105</sup> *See generally* Lyman Ray Patterson, Copyright in Historical Perspective (1968).

<sup>106</sup> *See generally* PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

<sup>107</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>108</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

expanded.<sup>109</sup> The Digital Millennium Copyright Act (“DMCA”) prohibits the circumvention of proprietary systems like a game console, regardless of the intent behind the circumvention—e.g., even if the underlying material that one is attempting to access is in the public domain.<sup>110</sup> Additionally, through a mix of contract and software, digital rights (or restrictions) management systems (“DRMs”) in combination with the DMCA significantly restrict the legal uses of copyrighted content and works in the public domain that are accessed through proprietary systems.<sup>111</sup> For example, electronic readers can limit how much of a book you can cut and paste or print, even if the book’s copyright has expired.

Conceptually simple reforms, such as reversing much of copyright’s expansion in length, scope, and reach by requiring copyright registration instead of having it automatically affix to works, would be exceptionally difficult to institute in practice given Big Copyright’s influence on lawmakers.<sup>112</sup> Other more elaborate reform proposals to reduce copyright’s overreach attempt to sufficiently appease Big Copyright to allow for copyright improvements. Landes and Posner have suggested allowing unlimited renewals of copyright terms in combination with renewal fees that could be quite high.<sup>113</sup> Skladany has proposed creating different tiers of copyright—a default tier of 14 years of protection with a second option of only one to two years of guaranteed protection with the possibility of yearly renewal as long as the artwork generated enough revenue to meet a stiff threshold requirement.<sup>114</sup> These various proposals could mitigate the harm caused by an overly expansive copyright regime, yet even if one or more were implemented, a commons exchange would still be helpful to reduce the percentage of such lost cultural creation.

While the above proposals aspire to reduce copyright in general, but allow for the possibility that certain artwork will receive extended

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<sup>109</sup> Penalties for copyright violations have also increased. No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (enhancing criminal liability for copyright violations).

<sup>110</sup> Digital Millennium Copyright Act, 17 U.S.C. §§ 1201–1205 (2000).

<sup>111</sup> DRMs also enable greater control of cultural creation through fees, passwords, etc.

<sup>112</sup> See Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485 (2004).

<sup>113</sup> See generally William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003).

<sup>114</sup> See generally Martin Skladany, *Unchaining Richelieu’s Monster: A Tiered Revenue-Based Copyright Regime*, 16 STAN. TECH. L. REV. 131 (2012).

terms, there are also reform proposals aimed at formalizing the efforts of Creative Commons and the free software movement. Merges states: “Private parties are working around the proliferation of property rights to maintain open channels of commerce and exchange. Instead of ‘order without law,’ as Ellickson titled his influential book, we have ‘order despite law.’ The upshot is the same: private re-engineering of the entitlement structure, in the interest of people getting things done.”<sup>115</sup> Yet he describes this response as simply “muddling through.”<sup>116</sup> He believes that legislative action is necessary and offers his own proposal. Merges maintains that the “Copyright Act could be amended to provide a statutory ‘safe harbor’ capturing at least some of the attributes of GPL-type licenses.”<sup>117</sup> The safe harbor “would become available simply by following statutory notice provisions, such as affixing an ‘L in a circle’ notice (for ‘Limited Copyright Claimed—Full Copyright Waived’).”<sup>118</sup> In his view, “[w]hile recent initiatives such as the Creative Commons license might ultimately achieve the same effect, no private initiative will ever quite match the ability of the statute to channel copyright owners into a uniform, widely understood standard practice.”<sup>119</sup>

Other reform proposals similarly focus on the need for legal change. Loren argues that courts should adopt a “doctrine of limited copyright abandonment” that “would result in the copyright owner retaining the ability to enforce the copyright rights that have not been granted to the public, while at the same time allowing the public to rely on the copyright owner’s clear expressions of intent to permit certain uses.”<sup>120</sup> Van Houweling examines the application of the law of servitudes—“non-possessory property interests that attach to land and impose their restrictions and obligations on generation after generation of landowners”—to digital content.<sup>121</sup>

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<sup>115</sup> Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183, 203 (2004).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 201.

<sup>118</sup> *Id.* at 201–02.

<sup>119</sup> *Id.* at 202.

<sup>120</sup> Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 327–28 (2007).

<sup>121</sup> Molly S. Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 885–86 (2007).

Elkin-Koren agrees that legislative reform is required. “Conceptualizing an alternative to the current regime may require an option of opting out of the proprietary system, and at the same time safeguard against capture and abuse. In the long run, creating an alternative to copyright will require copyright reform.”<sup>122</sup> There is widespread agreement that change is needed, but change is hard to implement given the power of Big Copyright. A commons exchange offers a way to reduce some of the harmful effects of the current copyright regime without having to deal with Big Copyright.

### III. LIMITS OF CREATIVE COMMONS AND THE FREE SOFTWARE MOVEMENT IN PREVENTING THE STAGNATION OF WORKS

Creative Commons and the free software movement have already developed an innovative model that in some ways obviates the need for a commons exchange for digital code, yet such conditions are unlikely to be replicated for the vast majority of cultural creations outside of software. A commons exchange is necessary to enable creations that do not fit within the free software model to outlive their original ownership and continue to evolve.

Creative Commons has helped alleviate some of the harm caused by the copyright regime by allowing creators to use their licenses freely, which permit artists to alter their work’s copyright status to make it more available.<sup>123</sup> Creative Commons offers over a half dozen licenses,<sup>124</sup> which aim to enhance the Commons.<sup>125</sup> Collectively they represent a spectrum of openness—granting the world different rights of use. For example, the CC BY license “lets others distribute, remix,

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<sup>122</sup> Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 422 (2005).

<sup>123</sup> Such granting of licenses is usually accomplished through a contract. Also, copyright’s statute of fraud provision mandates that all transfers in ownership be in writing. 17 U.S.C. § 204 (2000). Yet ownership transfer does not include nonexclusive licenses. 17 U.S.C. § 101 (2000).

<sup>124</sup> Since each of the numerous rights granted to a creator through copyright law may be separately or collectively licensed to others, there is significant scope to create many different licenses. 17 U.S.C. § 201(d) (2000).

<sup>125</sup> Technically, except for material under a CCo license, all other work under Creative Commons licenses is under a semicommons status, a term used by Smith to describe real property that contains a combination of private and common property rights that significantly interact. Henry Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 *J. LEGAL STUD.* 131, 131–32 (2000).



tweak, and build upon your work, even commercially, as long as they credit you for the original creation.”<sup>126</sup> At the other end of the spectrum, the CC BY-NC-ND license prohibits commercial use and the creation of any derivatives, though it allows for the work to be downloaded and shared.<sup>127</sup>

Creative Commons grew out of the free software movement, most associated with the Free Software Foundation.<sup>128</sup> In the Foundation’s view, “free software means that the software’s users have freedom,” in the sense of free speech not free beer.<sup>129</sup> This means that “users have the four essential freedoms: (0) to run the program, (1) to study and change the program in source code form, (2) to redistribute exact copies, and (3) to distribute modified versions.”<sup>130</sup> Free software does allow for “certain kinds of rules about the manner of distributing free software” as long as such rules do not “conflict with the central freedoms.”<sup>131</sup> Arguably the most important example of this is copyleft, which mandates that “when redistributing the program, you cannot add restrictions to deny other people the central freedoms. This rule does not conflict with the central freedoms; rather it protects them.”<sup>132</sup> Free software has to be available for commercial use, development, and distribution.<sup>133</sup>

The properties of software and the milieu of the programming community suggest that free software in general may not need a commons exchange to the same extent that other cultural creation does. If an active community exists that collectively creates and continually updates a project under a free software or open Creative

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<sup>126</sup> *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses> (last visited May 31, 2013).

<sup>127</sup> *Id.*

<sup>128</sup> Richard Stallman was the driving force behind the free software movement. *See generally* RICHARD M. STALLMAN, *FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN* (Joshua Gay ed., 2002).

<sup>129</sup> *Philosophy of the GNU Project*, FREE SOFTWARE FOUNDATION, <http://www.gnu.org/philosophy> (last visited May 31, 2013).

<sup>130</sup> *Id.*

<sup>131</sup> *What is Free Software?*, FREE SOFTWARE FOUNDATION, <http://www.gnu.org/philosophy/free-sw.html> (last visited May 31, 2013).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

Commons license, the existence of a commons exchange will not add any present value to the project because such collaborative production is in essence a quasi-institutional structure—a community that sustains itself through passing on the project from one generation to the next.<sup>134</sup>

However, Creative Commons and the free software movement cannot fulfill the role of a commons exchange for all cultural creation. Even though prominent examples of successful cooperation exist outside of software, such an intensely rich collaborative milieu is unlikely to materialize for the majority of artistic, academic, or personal creative pursuits.<sup>135</sup> The numerous reasons for this distinction are discussed below.<sup>136</sup>

First, only cultural creation, such as software, that can be divided into small pieces, “each of which can be performed by an individual in a short amount of time,” will likely allow collaborative, peer-based production to flourish.<sup>137</sup> These individual modules should be able to be created independently of the other modules.<sup>138</sup> Benkler states: “This enables production to be incremental and asynchronous, pooling the efforts of different people, with different capabilities, who are available at different times.”<sup>139</sup> The effort to complete most components should be minimal in order to increase the number of

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<sup>134</sup> Theoretically, even if all cultural creation is initially created in Wikipedia-like collaborative environments, one could argue that a commons exchange could still play a valuable role by acting as free insurance for projects in case their communities collapse. Wu reminds us that although “a project like Wikipedia seems undeniably popular now, its volunteer-based mode of production may simply lose favor one day.” Wu, *supra* note 32, at 348. He states: “While these developments sound unlikely, so, perhaps, did the idea of the novel to one generation of writers, or the idea of Linux to a different generation of programmers.” *Id.*

<sup>135</sup> For example, while deviantART, the “largest online social network for artists,” has over 30 million registered members and attracts 65 million unique visitors per month, it is more a blend of Facebook and Amazon than a peer-based artistic collaboration. *About deviantART*, DEVIANART, [about.deviantart.com](http://about.deviantart.com).

<sup>136</sup> The strokes below are general and not meant as absolute truth. Further, counterexamples will likely exist for each distinction discussed.

<sup>137</sup> Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 378 (2002).

<sup>138</sup> *Id.* at 379.

<sup>139</sup> *Id.*

potential contributors.<sup>140</sup> Benkler concludes that “[n]ovels, for example, at least those that look like our current conception of a novel, are likely to prove resistant to peer production.”<sup>141</sup> Furthermore, Benkler maintains that he is not suggesting that peer collaboration “is always the more efficient model of production for information and culture.”<sup>142</sup>

Second, collaborative production taking the place of an Internet adoption agency works more successfully for software because inferior software has a lack of utility while art’s value is more in the eye of the beholder. Software often has a practical, targeted purpose—e.g., to be the best operating system or the most user-friendly e-calendar—that regularly facilitates one version being judged superior to another. While peer production in one light can be viewed as sharing, it can also be thought of as an unyielding, fiercely competitive challenge where numerous programmers modify an existing program and generally only the best modifications get reproduced in future versions of the software. This form of competition does not apply to artwork whose value is more subjective. I adore Gorecki’s Third Symphony but my family members do not. Also, while there might be fierce competition among different works of art for long-term recognition, there is still space for lesser-known art to coexist meaningfully with better-known art. To some extent this is true of software—some users might prefer one e-calendar over another because of differing functions, though one program or one version of a program is simply better. Yet a superior software program can have its dominant position reinforced by the fact that software is particularly prone to network effects.<sup>143</sup> The more individuals who adopt a program, the harder it is for a new program to displace it because of the transaction costs for individuals to switch programs.<sup>144</sup> Such network effects are much less prevalent with other forms of cultural creation because artwork is not generally created to accomplish practical tasks—e.g., switching one’s movie preference simply entails renting different movies, unlike changing one’s penchant for word

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 381.

<sup>143</sup> DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 198 (2008).

<sup>144</sup> *Id.*

processing programs, which forces one to laboriously transfer files from one format to another.

Benkler formulates this second requirement of successful peer production in a similar vein. He suggests that fruitful peer production “must have low-cost integration, which includes both quality control over the modules and a mechanism for integrating the contributions into the finished product.”<sup>145</sup> He argues that “[i]f a project cannot defend itself from incompetent or malicious contributions and integrate the competent modules into a finished product at sufficiently low cost, integration will either fail or the integrator will be forced to appropriate the residual value of the common project—usually leading to a dissipation of the motivations to contribute *ex ante*.”<sup>146</sup>

In summary, collaborative creation as practiced by programmers in the free software movement should be encouraged but will likely never exceed a fraction of all cultural creation. While a free software model of constantly building on top of the work of others on a limited number of projects could be beneficial in creating a formal or informal institutional mechanism to support a portion of creative activity, the nature and culture of coding versus that of other cultural pursuits means that a commons exchange is necessary to improve the odds that websites and digital artwork that do not easily fit within the free software model live on after their initial owners can no longer maintain them.

#### IV. ENCOURAGING FREE CULTURE

A commons exchange must confront both the theories espoused by Creative Commons and the free software movement and the value of practically applying their licenses. Doing so means advocating for the vision espoused by the free software movement over the theoretical approach taken by Creative Commons, while acknowledging that in practice, the less restrictive of the Creative Commons licenses,<sup>147</sup> not free software licenses, are the most practical to fulfill the spirit of the free software movement for cultural creation that is not software.<sup>148</sup>

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<sup>145</sup> Benkler, *supra* note 137, at 379.

<sup>146</sup> *Id.*

<sup>147</sup> Such as CCo relative to CC BY-NC-ND.

<sup>148</sup> The Wikimedia Foundation passed a resolution on May 21, 2009 stating it “exercises its option under Version 1.3 of the GNU Free Documentation License to relicense the Wikimedia sites as Massive Multiauthor Collaborations under the Creative Commons Attribution-Share Alike 3.0 license, effective June 15, 2009.” Wikimedia, Licensing

For cultural creation generally, Creative Commons licenses are not only more known and utilized than free software licenses, but also more user friendly in terms of presentation and reduced complexity.<sup>149</sup>

Scholars have levied numerous related criticisms against Creative Commons: its proliferation of licenses increases the transaction costs of using them because of the time required to learn about the different aspects of each; its licenses at times conflict with each other; its licenses are rather restrictive relative to free software licenses; its mission is unclear, or at least diluted; and it reinforces copyright. Relative to the free software movement, all of these criticisms are relatively apt, yet none are fatal and they vary in their impact on the Commons. Also, these criticisms are highly interconnected.<sup>150</sup>

First, Elkin-Koren has argued that Creative Commons strategically decided to maximize the reach of its movement through creating numerous licenses that collectively would appeal to the greatest number of creators at the expense of increasing the costs associated with using the licenses.<sup>151</sup> Learning about the details of one license takes substantially less time for creators and users than having to examine over a half dozen licenses in order to select the most appropriate one. The description of this tradeoff is accurate, but the tradeoff on its own does not cripple Creative Commons because many initiatives face a similar tension—"the Open Source Initiative has approved over 70 licenses as complying with the [open source

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Update/Result, [http://meta.wikimedia.org/wiki/Licensing\\_update/Result](http://meta.wikimedia.org/wiki/Licensing_update/Result) (last visited June 9, 2013).

<sup>149</sup> For example, the GNU General Public license is roughly twice the length of the CC BY license.

<sup>150</sup> There are other criticisms of Creative Commons that are less obviously correct. For example, Séverine Dusollier argues that Creative Commons, or at least the founders of the organization, are primarily concerned with consumers', not creators', welfare. Dusollier states: "Lessig . . . does not present any reason why the artist should favor a Creative Commons system except that they sometimes build upon the works of others." Dusollier, *supra* note 17, at 287. Dusollier maintains that Lessig "is not concerned about creators; rather, he wants free access to free culture. This mission is, of course, not consonant with the objective of copyright, which aims *both* to protect creators and to enhance access to artistic works." *Id.* Yet it is unclear whether all artists want to be "protected" given that the process of creation and its spur to dialogue (which Dusollier acknowledges) with others is arguably more important to them, and that those artists who disagree can simply not use Creative Commons licenses.

<sup>151</sup> Elkin-Koren, *supra* note 122, at 378.

definition].”<sup>152</sup> Yet this proliferation of different licenses has numerous other consequences. For example, different Creative Commons licenses can conflict with each other when content under two different licenses is combined in the creation of a new work.<sup>153</sup> Katz states that such incompatibility “suggests the limits to the flexibility [Creative Commons] licenses can offer users, further illuminating the tension inherent in using exclusive rights and restrictive licenses to help grow a commons.”<sup>154</sup>

The remaining three criticisms raised by academics—that Creative Commons only weakly advocates for the Commons, that its mission is unclear, and that it reinforces copyright—will be addressed together. It is claimed that Creative Commons’ advocacy for the Commons is lukewarm given that numerous Creative Commons licenses are rather restrictive relative to a free software movement license and because Creative Commons offers numerous licenses.<sup>155</sup> It is further argued that such plurality and diversity in licenses offered make Creative Commons’ mission unclear, or at least diluted, because it “lacks a comprehensive vision of the information society and a clear definition of the prerequisites for open access to creative works.”<sup>156</sup> These claims are based on the aforementioned fact that Creative Commons favors the widespread adoption of its licenses, not the advocacy of robust creative freedom. Such a position is not strictly inconsistent, yet Creative Commons’ founding was based on the premise that a staggered, two-stage copyright reform movement is necessary: first remake how people think about the social norm of copyright, including through advocating for the widest adoption of Creative Commons licenses, then push for political reform to limit the excesses of copyright.<sup>157</sup> Further, Lessig, a co-founder of Creative Commons, is not opposed to copyright, he only wants to see it brought back in line

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<sup>152</sup> Robert W. Gomulkiewicz, *Enforcement of Open Source Software Licenses: The MDY Trio’s Inconvenient Complications*, 14 YALE J.L. & TECH. 114 (2011) (citing Open Source Initiative, Open Source Licenses, <http://www.opensource.org/licenses/index.html>).

<sup>153</sup> Zachary Katz, *Pitfalls of Open Licensing: An Analysis of Creative Commons Licensing*, 46 IDEA 391, 411 (2006).

<sup>154</sup> *Id.*

<sup>155</sup> See Elkin-Koren, *supra* note 122.

<sup>156</sup> *Id.* at 377.

<sup>157</sup> LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 275, 282 (2004).

with its past limited scope and length. Creative Commons offers licenses that range from resembling the current bounds of copyright law to revoking all of copyright. Thus, “[w]ithout clear values to preserve, and without consciously using licenses as an interface to defend against the practices of the dominant proprietary culture, those who adopt CC licenses are more likely to endorse copyright law rather than proposing a different normative structure for their fellow adopters and users of their works.”<sup>158</sup> Chen claims: “In this sense, one can argue that CC’s licensing model is less likely to build a self-sustainable community, and is more vulnerable to the penetration of the mainstream proprietary culture.”<sup>159</sup>

Ideally, an effective “public license should on the one hand embody the ethos of the community, and on the other allow the community to negotiate enough room and time to rebuild itself, to reestablish community norms, to experiment and to accumulate resources which will allow the community to thrive, and to gradually prove its value.”<sup>160</sup> Chen believes “[t]hese self-experiments are not only important for the free software and broader free culture communities, but may also shed light for all of us on our relationships with one another in the global information society.”<sup>161</sup> Kelty has argued that “not only do free software practitioners see their practices as a philosophy, a critique, a culture, and a ‘way of life,’ but that such critique has been expanded to include ‘a new set of practices concerning authorship, ownership, expression, speech, law, politics and technology.’”<sup>162</sup>

While a commons exchange would do good to follow the philosophy of the free software movement, whether that vision actually transcends the culture of copyright is not clear-cut.<sup>163</sup> Alternatively, the differences between the free software movement and Creative Commons should not be overstylized. Just like Creative

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<sup>158</sup> Chen, *supra* note 14, at 139.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 138 (citing Chris Kelty, *Culture’s Open Source: Software, Copyright, and Cultural Critique*, 77 ANTHROPOLOGICAL Q. 499, 499 (2004)).

<sup>163</sup> See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008) (discussing “frame mobilization” literature and how law “exerts a gravitational pull on framing processes”).

Commons, the free software movement is still forced to use copyright to protect its community—copyleft licenses only make sense with the existence of copyright. The reliance on such licenses is “risky” because “[i]t entails support of strong copyrights and freedom of contract.”<sup>164</sup> Doing so mandates altering contract law to enable third-party enforcement.<sup>165</sup> Essentially, “[t]he legal regime that would validate Creative Commons’ licenses would also enforce contracts that restrict access to creative works.”<sup>166</sup> The courts have only recently endorsed this conclusion, ruling in *Jacobsen v. Katzer*<sup>167</sup> that open source licenses are enforceable.<sup>168</sup> Some do not necessarily find this to be a bad result. Wu believes that a neutral authorship policy for copyright “leads to an interesting defense of the existence of copyright at all . . . . [E]nforceable rights may sometimes be useful for maintaining the integrity of both open and closed works.”<sup>169</sup> He argues that “[e]very mode of production, even those that strive to keep works open and free, requires mechanisms to prevent behavior that would ruin the project.”<sup>170</sup> Yet he hastens “to add that some of these mechanisms can be non-legal—the norms surrounding many open projects are what keep them that way.”<sup>171</sup>

A commons exchange should strive for a consistent, copyright-transcendent vision such as the one espoused by the free software movement. Yet most cultural creation has incorporated a wide variation in openness through the broad use of Creative Commons licenses. Thus, a similar tension to the one experienced by Creative Commons exists for a commons exchange. On the one hand, if a commons exchange required those putting their work up for adoption to use an open license, it would run the risk of poisoning its own mission by limiting the amount and range of artwork available for

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<sup>164</sup> Elkin-Koren, *supra* note 122, at 421.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Jacobsen v. Katzer*, 535 F.3d 1373, 1385 (Fed. Cir. 2008).

<sup>168</sup> Yet Gomulkiewicz argues that a recent trio of cases creates complications for such licenses. *See generally* Gomulkiewicz, *supra* note 152.

<sup>169</sup> Wu, *supra* note 32, at 337.

<sup>170</sup> *Id.* at 337-38.

<sup>171</sup> *Id.* at 338.



cultural exchange. On the other hand, if a commons exchange did not promote the vision behind the free software movement, it could inadvertently help solidify the overreaching nature of copyright. No ideal solution exists, though a path must be chosen. A plausible option appears to be allowing any cultural creation to be put up for adoption, yet encouraging all artists to put their work under open Creative Commons licenses.<sup>172</sup> A commons exchange could explain the vision and benefits behind open licenses and ask those looking to hand off their work to consider altering the work's license.<sup>173</sup> Unlike Creative Commons, which does not try to persuade users to embrace a particular Creative Commons license, a commons exchange would be attempting to not only help cultural creation evolve under new ownership but be more open at the same time.<sup>174</sup>

## V. POSSIBLE PROBLEMS OR CONCERNS

This section will mention potential concerns and problems and demonstrate how they are either capable of being dealt with or specious.

### *A. Encouraging Copyright Trolls & Baseless Lawsuits*

Many have characterized copyright trolls as purposefully reducing creativity by hoarding copyrights for the sole purpose of threatening creators with possible copyright infringement suits.<sup>175</sup> Copyright trolls

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<sup>172</sup> Those giving away their cultural creations could attempt to stipulate that the adopter not change the openness of the license to make it more restrictive to discourage any future adopter from adopting a work primarily for commercial reasons.

<sup>173</sup> A commons exchange could even consider encouraging or requiring those who do not use one of the more open Creative Commons licenses to donate five dollars to a charity of their choosing, or require that the donated money go to a pro-commons nonprofit. If a commons exchange was ever able to cultivate a group of volunteers to help creators update their code, such assistance could possibly be conditioned on the cultural creation being under an open Creative Commons license.

<sup>174</sup> Also, by allowing any cultural creation to be put up for adoption, not simply works where the owner agrees to have the work be under an open license, a commons exchange would be attempting to prevent or postpone a for-profit commercial entity from entering the Internet adoption space. If such a for-profit Internet adoption agency came into being, it would inevitably encourage owners to commodify their creations—to make their art more restrictive, not less.

<sup>175</sup> See Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. (2013); James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass*

will probably not be enticed by the selection available on a commons exchange because the works most likely to be put up for adoption are those under Creative Commons licenses or not currently economically successful. Further, it has been argued that a commons exchange should encourage those letting go of their creations to simultaneously attach an open Creative Commons license. Finally, the copyright assignment contract can expressly forbid the use of the adopted work for either any commercial use or copyright troll-like behavior.<sup>176</sup>

Zittrain has brought to attention other concerns. First, since proprietary software generally does make its source code available, it is difficult for free software projects to know if a company is stealing its code for profit without complying with the free software license.<sup>177</sup> An asymmetry exists in that free software “is much more vulnerable to claims of infringement by proprietary code authors, since the source code to free software is, by definition, available for examination by would-be plaintiffs.”<sup>178</sup> Second, the “collaborative nature of free software development makes it harder to determine where various contributions are coming from, and whether they belong to those who purport to donate them.”<sup>179</sup>

Given such concerns, the possibility of baseless or legitimate lawsuits against open collaborative projects is worth protecting against. To counter such risk “[t]he open source community sought to address these concerns by offering Open Source Risk Management (‘OSRM’).”<sup>180</sup> A commons exchange could consider providing a similar arrangement.<sup>181</sup>

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*Copyright Litigation in the Age of the Statutory Damages*, 19 UCLA ENT. L. REV. 79 (2012).

<sup>176</sup> While defining such activity could be tricky, the contract could potentially focus on aspects such as the adopter agreeing to not bring any suits against individuals or nonprofits using the material in certain ways. A similar analysis has been incorporated into fair use determinations where the nature of the use of copyrighted material is considered. See 17 U.S.C. § 107(1).

<sup>177</sup> Jonathan Zittrain, *Normative Principles for Evaluating Free and Proprietary Software*, 71 U. CHI. L. REV. 265, 286 (2004).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Elkin-Koren, *supra* note 122, at 419.

<sup>181</sup> Zittrain also proposes “the possibility that copyright’s statute of limitations might be applied to require those claiming copyright infringement to bring such claims within a three-year (or shorter) window stemming from the targeted software’s initial public release

### B. *Why Would Anyone Want to Adopt?*

Some individuals might have difficulty understanding why anyone would want to adopt an existing cultural creation as opposed to creating one on their own. Yet adopting an existing site will hold many attractions for a large proportion of individuals.

First, there will always be individuals who prefer to create from scratch, which should not be discouraged. Yet even those that do so must realize that their creation is built on the backs of previous artists with similar thoughts, theories, and styles of expression—that they are standing “on the shoulders of Giants.”<sup>182</sup> Thus, building off of existing art is similar to taking over someone else’s website. Adopting artwork is a more explicit recognition of this grand collaborative project spanning all artists over centuries.

Second, there is no need to necessarily recreate the wheel. For example, if someone has carefully listed many of the festivals in Italy, why not build from this existing resource instead of attempting to recreate it? Alternatively, it will often be less wasteful to adopt a repository of bird photos than to start building one *de novo*. Just imagine if everyone discarded all the buildings in a city in order to build anew. Such duplication would be incredibly expensive and waste countless time and effort. Instead, what usually happens is that people acquire an existing building and make it into their own home—painting the walls a different color, hanging new artwork and curtains, buying a new showerhead, and possibly remodeling the kitchen or removing an interior wall. This is the essence of what could be done with existing websites—those who newly adopt a site can alter its aesthetics, update some links and data, and potentially even rewrite some code, not take a bulldozer to the entire website.

Third, it will often be less daunting to some to adopt an existing cultural creation and gradually modify it than to start from scratch. It would be a way to ease into the creative process.

Finally, why do people collect paintings or books?<sup>183</sup> Some build an extensive library as a tool to improve their thought process and

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of source code, encouraging creators within both models to release their source code, and providing helpful legal stability to those wishing to work within a collaborative software development environment.” Zittrain, *supra* note 177, at 287.

<sup>182</sup> *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 77 n.3 (D. Mass. 1990) (quoting Isaac Newton).

<sup>183</sup> See generally *Interpreting Objects and Collections* (Susan M. Pearce ed., 1994). For a negative analysis, see Russell W. Belk, *Collecting in a Consumer Society* (1995).

writing. Others collect paintings partially to ensure the survival of the art. Adopting cultural creations to use as a creative muse or to preserve it will likewise be motivating factors to some.

*C. Facilitating Adoption Should Be Left to the Private Sector*

One might argue that the private sector is more efficient than the public sector in providing private, as opposed to public, goods,<sup>184</sup> and hence should be left in charge of adoptions of cultural creations on the Internet. The argument is that the pressures of competing for financial gain compel private firms to achieve increasingly greater efficiency, whereas governments and government-funded entities do not respond as effectively to information embedded in prices but rather march to the orders of those with political power.<sup>185</sup> While this argument is often extended to privately funded nonprofits vis-à-vis for-profit entities, given that a commons exchange would most likely rely on volunteer efforts and private donations from individuals or foundations, a good portion of this criticism is neutralized.

A variant of this possible criticism is that even though the government will not be involved, the private sector should be left to tackle initiatives that have the potential to make money while donations and volunteer efforts should target societal problems that business would not get involved with because of a lack of foreseeable profitability. While this is a good justification for why charitable efforts are integral to helping society, it does not provide a solid reason why nonprofits should not also be active in potentially profit-making activities, especially if success in such social business ventures can fund charitable activities.<sup>186</sup>

Others could aver that there is not enough human or financial capital dedicated to charity, so taking any such capital away from current charitable efforts would be harmful. This is a variant of the lump-of-labor fallacy—that there are only so many jobs to go around, so bringing more individuals into the labor force, for example, through immigration or increasing female labor participation rates, will push others out of jobs or simply increase the number of people

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<sup>184</sup> See generally FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (Univ. Chicago Press 2007) (1944).

<sup>185</sup> *Id.*

<sup>186</sup> In fact, if successful, such social ventures provide other advantages to charities such as stable, long-term sources of funding.

chasing after the same, fixed number of positions.<sup>187</sup> The problem with the lump-of-labor hypothesis is that it fails to recognize that more workers means there are more individuals spending money, which creates more demand for goods and hence more new jobs. If there is not enough skilled labor to fill such jobs in the short run, then the demand for such workers will motivate individuals to acquire the necessary skills in the medium to long term, so long as artificial market impediments, such as guilds, do not get in the way.

As for a lack of financial capital, the point behind social ventures—entities that seek to make profit that is funneled into charitable activities—is precisely to increase the financial resources available to charitable activities.

More importantly, society needs to safeguard its privacy and also be vigilant against any encroachments on the open and free flow of information. While strict privacy controls and encouraging the vitality of the public domain can be policies adopted by business, they cannot be assumed to be the default settings of corporations. Additionally, if a firm was to charge a fee either to those wanting to put up a website for adoption or those interested in adopting, such cost would inevitably reduce the number of individuals willing to take part, hence limiting the growth in the Commons.

Yet another possible criticism in this line of attack could be that since the private sector did not come up with the idea itself, the market must not be large enough to be self-sustaining. The only real issue here is whether the nonprofit sector should ever take risks; yet not taking risks would preempt any reform of any nonprofit or government institution such as failing schools. No one thought Wikipedia was necessary before it came into existence, and it now has over 470 million unique users a month.<sup>188</sup> While this may not be an argument for a commons exchange, it serves to demonstrate that extremely simple ideas can create or meet unknown demand. Moreover, encyclopedias already existed online before Wikipedia, unlike adoption agencies for digital content.

Finally, establishing a commons exchange would not preempt the creation of a stand-alone second site that helps individuals pass on

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<sup>187</sup> See generally Paul Krugman, *Lumps of Labor*, N.Y. TIMES (Oct. 7, 2003), available at <http://www.nytimes.com/2003/10/07/opinion/lumps-of-labor.html>. For a contrary view, see Tom Walker, *Why Economists Dislike a Lump of Labor*, 65 REV. SOC. ECON. 279 (2007).

<sup>188</sup> *Wikipedia: About*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Wikipedia:About#cite\\_note-1](http://en.wikipedia.org/wiki/Wikipedia:About#cite_note-1) (last visited June 9, 2013) (follow “Wikimedia, Report Card” hyperlink).

small businesses to each other. The field of mergers and acquisitions for small businesses is something either a commons exchange or a for-profit start-up could pursue. Another possibility is the creation of a second site that would hold auctions for websites and artwork up for adoption. However, the point of a commons exchange is to enhance the Commons, not to commodify cultural creation.

*D. Failed Adoptions, Inaccurate Representations, & Preserving Unsavory Material*

Failed adoptions will occur, just as people with the best of intentions to provide a stable home for a child sometimes cannot do so. Approximately one to five percent of completed adoptions of children dissolve,<sup>189</sup> while 10 to 25 percent of adoption proceedings end in disruption—"an adoption process that ends after the child is placed in an adoptive home and before the adoption is legally finalized, resulting in the child's return to (or entry into) foster care or placement with new adoptive parents."<sup>190</sup> It is also estimated that "[m]ore than 20 percent of people who leave dogs in shelters adopted them from a shelter."<sup>191</sup> Yet we would never think of preventing people from adopting those in need, nor should we in the case of cultural creation. Further, the default alternative—losing vast amounts of cultural creation—would be the practical equivalent of all adoptions failing. A commons exchange should continually monitor failed adoptions in order to improve success rates. Part of such an examination should be asking both parties to an adoption whether it was successful and, if not, why it failed.<sup>192</sup>

While a commons exchange would provide information on specific websites and digital artwork that creators are attempting to hand

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<sup>189</sup> *Adoption Disruption and Dissolution*, CHILD WELFARE INFORMATION GATEWAY 6 (June 2012), available at [https://www.childwelfare.gov/pubs/s\\_disrup.pdf#page=5&view=Dissolutions](https://www.childwelfare.gov/pubs/s_disrup.pdf#page=5&view=Dissolutions).

<sup>190</sup> *Id.* at 1-2.

<sup>191</sup> *Pet Statistics*, ASPCA, <http://www.aspc.org/about-us/faq/pet-statistics.aspx> (last visited June 8, 2013). "Approximately 5 million to 7 million companion animals enter animal shelters nationwide every year, and approximately 3 million to 4 million are euthanized (60 percent of dogs and 70 percent of cats)." *Id.*

<sup>192</sup> A commons exchange could then examine if there are any patterns to the failed adoptions, for example, particular subjects or the use or lack of use of certain application materials.

over—the creator’s name and contact details; the site’s title, URL, and subject matter; and a mission or content summary<sup>193</sup>—those putting material up for adoption should have the choice to select how much and what type of information to ask for from applicants wanting to adopt their work. For example, a commons exchange could allow those placing a website up for adoption to solicit biographies, CVs, references, examples of past work, and even essays from those interested in adopting the site and to conduct interviews over Skype.

A second concern is that impostors could claim that they own a website. This fraudulent activity would effectively be dealt with by requiring any site owner who initiates an adoption request to upload a commons exchange “adopt me” logo to her site before the commons exchange would recognize her adoption request. The idea is that only the legitimate owner of the site could post the commons exchange logo.<sup>194</sup>

Verifying the proper owners of digital artwork would be more difficult, yet there are numerous ways to minimize concerns. Part of reducing misrepresentations would be to require both parties to take steps to verify their identities to the commons exchange and to each other. One widely used method is requiring anyone registering with a commons exchange to complete her application by clicking on a link sent to her email. This partially minimizes the ability to sign up pretending to be someone else. Parties should also be encouraged to do their due diligence online as to the artwork in question and each other. As mentioned earlier, a commons exchange should allow for someone putting a cultural creation up for adoption to ask for numerous types of information, even references. Further, as online communities develop, they often establish ways to monitor each other such as ratings of the trustworthiness of users.<sup>195</sup> If in one night Airbnb helps 140,000 people trust complete strangers enough to rent a place to stay from them—sometimes on couches or air mattresses—

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<sup>193</sup> Other potential information could include the site’s artistic style, political or philosophical bent, number of page impressions, average daily or weekly page maintenance, ideal adoption deadline, etc.

<sup>194</sup> A commons exchange could automatically search for the presence of the “adopt me” logo on the sites up for adoption on a decreasing basis over time.

<sup>195</sup> See *Feedback Scores, Stars, and Your Reputation*, EBAY, <http://pages.ebay.com/help/feedback/scores-reputation.html> (last visited June 9, 2013).

then developing methods to build confidence between commons exchange users seems eminently achievable.<sup>196</sup>

A final concern is that a commons exchange would help preserve ethically suspect cultural creations by facilitating connections among individuals with similar extreme views. Such a service could even be more critical to the preservation of extremist websites because an owner of such a site, relative to owners of less extreme sites, is less likely to have a large enough social network of individuals with similar beliefs to find someone to take over her site.

In the long run, scholars from Socrates to Jefferson have believed that truth and justice should prevail in the marketplace of ideas.<sup>197</sup> Justice Oliver Wendell Holmes Jr. stated in a dissenting opinion:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>198</sup>

Getting to this future period of harmony might take a while, but the alternative—censorship—is not worth the short-term apparent accord.

That said, certain sites would not be welcome, such as those advocating child pornography, abuse of women, etc. This may seem like a contradiction. While a response could fill books, the general view is that content should be prohibited if the underlying beliefs are

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<sup>196</sup> Thomas L. Friedman, *Welcome to the 'Sharing Economy'*, N.Y. TIMES, July 21, 2013, at SR1, available at <http://www.nytimes.com/2013/07/21/opinion/sunday/friedman-welcome-to-the-sharing-economy.html?pagewanted=all>.

<sup>197</sup> For a contrary view, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

<sup>198</sup> *Abrams v. U.S.*, 250 U.S. 616, 630 (1919).



so obviously a violation of Mill's harm principle<sup>199</sup> and universal human rights that accommodating them would only lead to immediate harm to the vulnerable groups affected by such despicable practices.<sup>200</sup> Finally, a commons exchange would not be alone in having to confront this problem. All major websites that serve as social or communicative springboards, from YouTube to Twitter, face the issue with some success.<sup>201</sup>

## VI. CONCLUSION

Not all great art gets recognized as such during its owner's lifetime, and not all website owners are skilled networkers. A commons exchange will give ideas and art time to find their audience, by preserving the accumulated labor and creativity of the Internet for future generations. This breathing space will inspire others to create and will check the power of Hollywood through increasing the decentralization of the creation and distribution of artwork. It will also keep knowledge perpetually expanding and changing with the times, by helping cultural creation live on and evolve under new artistic direction. And someday a commons exchange might even facilitate its own adoption.

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<sup>199</sup> For a thought-provoking analysis, see Wojciech Sadurski, *Joseph Raz on Liberal Neutrality and the Harm Principle*, 10 OXFORD J. LEGAL STUD. 122 (1990).

<sup>200</sup> For a fascinating account of the philosophical underpinnings of human rights, see JAMES GRIFFIN, *ON HUMAN RIGHTS* (Oxford Univ. Press 2008).

<sup>201</sup> For example, Twitter prohibits "content promoting child sexual exploitation." *Child Sexual Exploitation Policy*, TWITTER, available at <https://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/37370-child-sexual-exploitation-policy>. Twitter also claims the right to withhold content from users in certain countries but not others depending on the content of the tweets. *Country Withheld Content*, TWITTER, <https://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/20169222-country-withheld-content#> (last visited June 9, 2013).

